IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5712

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALBERTO GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA 92 CA 0444 (SA 91 CR 110))

(June 17, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Alberto Garcia was charged in a one-count indictment for possession with intent to distribute more than five kilograms of cocaine. Garcia filed a motion to suppress evidence seized following a search of the Chevrolet Blazer he was driving at the time he was arrested. After the government filed other pleadings, including an enhancement information based on a previous

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

conviction, which subjected Garcia to a potential mandatory minimum sentence of twenty years, Garcia entered a guilty plea pursuant to a plea agreement with the government. In the plea agreement, Garcia agreed to plea guilty in exchange for the government's promise to dismiss the enhancement information, thereby reducing the mandatory minimum imprisonment to ten years, and not to oppose Garcia's request to serve his sentence in California. The government also agreed that it would not oppose Garcia's motion for credit against time spent in state custody since his arrest. The agreement specified that the sentence would be no more than ten years. Garcia pleaded guilty in a videotaped plea hearing.

The district court sentenced Garcia to 120 months incarceration and a five-year term of supervised release. Garcia did not appeal, but later filed a 28 U.S.C. § 2255 motion, alleging (1) ineffectiveness of counsel, (2) that his guilty plea was involuntary because he was coerced by counsel's suggestions that he work out an agreement with the government to reduce the potential punishment, (3) that the factual basis was not sufficient to support his conviction, and (4) the seizure and subsequent search of his vehicle violated his Fourth Amendment rights. Issues 2, 3, and 4 have been abandoned on appeal.

A DEA agent, Joel K. Reece, indicated in an affidavit underlying Garcia's arrest warrant that, according to an offense report written by deputy sheriff Clay Marker, Garcia was stopped for speeding. Marker made a traffic stop and identified Garcia by his Texas driver's license. After a warrant check indicated that

Garcia had outstanding warrants for his arrest, Garcia was arrested and his vehicle was impounded. Thirty seven packages of cocaine weighing one kilogram each and valued at $22,000 were later found in a secret compartment (false gas tank) fabricated on the Blazer.

Garcia indicated in his § 2255 motion that the tow truck operator, Charlie Barnes, stopped at a gas station to fuel up and "saw several shiny screws protruding out of the wheel well" of Garcia's vehicle. Barnes looked further underneath the vehicle and saw what appeared to be an extra gas tank. When Barnes could not find a filler hole, he found that suspicious and lifted several layers of carpet to find a "trap door panel cut out of the floor board." Barnes removed the trap door panel and "discovered that the extra tank was a hidden compartment and that it contained packages of what he suspected to be illegal drugs." Garcia contended that, rather than acting as a private citizen, Barnes acted as an agent of the state.

Although Garcia asserts in his § 2255 motion that he told counsel that he did not know that cocaine was concealed in his vehicle, he wrote a letter to the district court after he pleaded guilty seeking to provide assistance to authorities, stating that he had "been on this side of the fence for many years" and had "become acquainted with some very powerful and dangerous people." Garcia emphasized that by seeking to provide assistance to authorities, he was endangering both himself and his family.

The magistrate judge recommended that Garcia's § 2255 motion be denied. The district court agreed after de novo review of the

magistrate judge's recommendation, denied Garcia's § 2255 motion, and ruled that counsel was not ineffective, that Garcia's plea was voluntary, and that Garcia had waived his Fourth Amendment claim. Garcia filed a timely notice of appeal.

Although Garcia launched a broad attack on the validity of the guilty plea hearing in his § 2255 motion, Garcia now points primarily to his understanding of the charges. Garcia argues, in part, that the failure of counsel and the district court to advise him of the nature of the charges against him rendered his guilty plea invalid. Garcia argues that neither counsel nor the district court informed him that, without knowledge, "constructive possession could not infer an intent to distribute."

Even if counsel failed to do so, the district court adequately instructed Garcia of the nature of the charge against him, including the requirement of intent to distribute, knowingly and intentionally. The indictment charged that Garcia "unlawfully, knowingly, and intentionally did possess with intent to distribute in excess of five kilograms of cocaine." Garcia admitted in the guilty plea hearing that he had read the charge in the indictment, that he understood the charge which was read to him in open court, that he had discussed the case with counsel, and indicated that he was satisfied with counsel's performance.

Garcia also attacks the validity of his guilty plea by arguing that, but for counsel's ineffectiveness, he would have not pleaded guilty, but would have sought to suppress evidence seized from the Blazer. Garcia argues that counsel was ineffective for failure to

adequately investigate the grounds for suppressing the government's evidence. Garcia also alleges, as discussed above, that counsel was ineffective for failure to explain the nature of the charge.

A claim that counsel has been ineffective will prevail only if the defendant proves that such counsel was not only objectively deficient, but also that the defendant was prejudiced by counsel's errors. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Effectiveness of counsel is presumed, and even counsel's unprofessional conduct will not constitute ineffective representation unless actual prejudice results sufficient to satisfy the "prejudice" prong. Strickland 446 U.S. at 691. The "prejudice" prong of Strickland involves an inquiry whether the result would have been different "but for counsel's unprofessional errors." Strickland, 466 U.S. at 694.

In the context of a guilty plea, in order to satisfy the "prejudice" part of the test, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

With the two prongs of Strickland in mind, this court should review ineffective-assistance claims without "the distorting effects of hindsight." See Strickland, 446 U.S. at 689. Garcia fails to overcome the strong presumption or "heavy measure of deference" that counsel's performance was tactically correct. See id. at 691.

Garcia's argument that counsel was ineffective for failure to instruct him regarding the nature of the charges against him lacks merit for failure to show prejudice. The district court found that Garcia's plea was knowingly and voluntarily made after a reading of the indictment in open court. Although Garcia does not allege that counsel made a misstatement of the law, even that would not necessarily be sufficient to show prejudice. Cf. Bonvillain v. Blackburn, 780 F.2d at 1248, 1253 (5th Cir.) (citations omitted), cert. denied, 476 U.S. 1143 (1986) (sentencing judge's instruction cures counsel's misstatement). Garcia cannot show that, but for counsel's performance, he would not have pleaded guilty because he did not understand the nature of the charge. Hill, 474 U.S. at 59.

Although a defendant's guilty plea forecloses subsequent claims relating to the deprivation of constitutional rights occurring prior to the guilty plea, including illegal searches and seizures, Norman v. McCotter, 765 F.2d 504, 511 (5th Cir. 1985), the defendant is not precluded from making a Sixth Amendment claim based on counsel's failure to competently litigate the Fourth Amendment claim. Kimmelman v. Morrison, 477 U.S. 365, 378, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

Garcia's ineffectiveness challenge is linked to counsel's alleged failure to investigate. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances,

applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691. In guilty plea cases, the inquiry is focused on the likelihood that "a failure to investigate or discover potentially exculpatory evidence ... would have led counsel to change his recommendation as to the plea." Hill, 474 U.S. at 59. Further, in a claim for ineffective assistance of counsel for failure to investigate, a habeas petitioner must allege with specificity what the investigation would have revealed and how it would have changed the outcome of the trial. United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989) (citation omitted).

Garcia alleges that review of a newspaper article and a television news broadcast would have revealed the county sheriff's statements regarding how the "extra gas tank" was actually discovered. Garcia quotes the sheriff's statement in both instances that, when the wrecker picked up the vehicle to tow it, "they immediately seen an extra gas tank. So they looked under the floor mats and seen rivets and bolts and knew they had something. So it was brought here to the Sheriff's office instead of the storage, and they went to work on it right then and there."

Garcia contended in his objections to the magistrate judge's report that he supplied counsel with a copy of the T.V. news broadcast so that counsel would obtain copies of the deputy's arrest report to ascertain how the hidden compartment was actually found. The government argues that, although the record does not indicate whether counsel reviewed the arrest report, such reports were not subject to pretrial discovery, but would have been

available following the deputy's testimony at trial. See Fed. R. Crim. P. 16(a)(2); 18 U.S.C. § 3500.

The sheriff's statement regarding the manner by which the extra tank was discovered conflicted with the testimony of Joel Reece, a DEA agent, at the detention hearing, who testified that the wrecker driver found the compartment about one hour after Garcia had been stopped. The wrecker called the deputy sheriff who then came to the vehicle.

The testimony of Reece was consistent with Garcia's own statement in his § 2255 motion, with the factual resume read in open court admitted as true by Garcia and with the facts before the magistrate judge in which Garcia asserted that it was the tow truck driver, Charlie Barnes, who searched the vehicle without a warrant. Although the government's version of the facts is based, in part, on Reece's affidavit which relies upon hearsay, Garcia fails to provide affidavits by Barnes or other sworn testimony to negate the government's version of events leading up to the seizure of evidence.

Garcia argues that the counsel's motion to suppress was untimely and superficial. This argument lacks merit.

The district court never ruled that counsel's motion was untimely. Counsel's failure to litigate the claim further in a suppression hearing was cut short by Garcia's decision to enter into a plea agreement with the government just days before the case was set for a jury trial.

Although counsel might have continued with the suppression motion into the hearing and then either entered a conditional plea or pursued the plea agreement only after losing, it is unclear whether the prosecutor would have agreed to do so. In light of the strong evidence of Garcia's guilt, the likelihood of losing at the suppression hearing, as discussed below, and the provision in the plea agreement substantially reducing Garcia's potential sentence, counsel's performance was not objectively unreasonable when he recommended that Garcia accept the plea agreement. See Hill, 474 U.S. at 59.

Garcia indicates that he informed the officer at the time of arrest that the "outstanding warrants" had been satisfied a month earlier. Garcia also contends that he has acquired verification that the warrants, upon which his arrest was based, had been removed prior to his arrest. Garcia argues that counsel was ineffective for failure to discover that the warrants were invalid. This argument is not persuasive because Garcia fails to argue that the officers knew the warrants were invalid.

As noted by the magistrate judge, good faith reliance on invalid warrants is an exception to the exclusionary rule. United States v. De Leon-Reyna, 930 F.2d 396, 400 (5th Cir. 1991) (en banc). Although the record is not clear whether counsel failed to investigate the validity of the warrants, Garcia does not show that he was prejudiced by such failure.

Under the circumstances, it is doubtful that the evidence could have been excluded. The magistrate judge noted that, because

the arrest was valid, the vehicle was subject to an inventory search pursuant to impoundment. However, neither the search conducted by the tow truck driver or subsequently by authorities was a true "inventory search." See United States v. Cooper, 949 F.2d 737, 748 (5th Cir. 1991) (search must be according to "established procedure"), cert. denied, 112 S. Ct. 2945 (1992). The search was valid on another basis.

Searches by private citizens are outside the reach of the Fourth Amendment. See United States v. Villarreal, 963 F.2d 770, 774 (5th Cir. 1992) (Fourth Amendment only protects from "unreasonable governmental action"). The magistrate judge noted that the evidence was admissible because Barnes, a private citizen, who was hired to tow the Blazer and not to search it, discovered the evidence, and the police merely confirmed the presence of contraband. That finding was not clearly erroneous. Once the officers had probable cause to believe that the vehicle contained contraband, a search of the entire vehicle was proper. See United States v. Johns, 469 U.S. 478, 482-83, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985); Carroll v. United States, 267 U.S. 132, 149, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

Garcia contended in his § 2255 motion that Barnes, a "contracted employee," was actually a government agent because, inter alia, he moved the vehicle at the request of the state, was paid to move it, and desired to find inculpatory evidence to assure future government contracts. Barnes fails to raise this argument

on appeal. It is thus abandoned. See Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985).

Garcia thus fails to show how counsel's investigation would have changed the outcome of a trial. "[E]ven when there is a bona fide defense, counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1983). In light of the range of choices available to Garcia, including the government's intent to seek enhancement and the risk of a minimum twenty-year sentence, counsel's advice to enter a guilty plea pursuant to a plea agreement fell within the range of objectively reasonable performance.

Garcia also argues that counsel "deliberately induced" him to enter the plea agreement "in a concerted effort" to deprive him of his constitutional rights. This argument is conclusional and unsupported by the record. The argument is also rebutted by Garcia's testimony in open court. Garcia's bargain with the government substantially reduced his sentence from a potential minimum sentence of 20 years to a fixed term of ten years. After receiving what he bargained for, Garcia should not be heard to complain that counsel was ineffective.

Garcia argues that this court should remand for an evidentiary hearing on the Fourth Amendment issue. Because the record conclusively shows that counsel was not ineffective, a hearing is

unnecessary. See Joseph v. Butler, 838 F.2d 786, 788-89 (5th Cir. 1988).

In light of the recommended disposition, Garcia's motion to supplement the district court record is denied.

AFFIRMED.